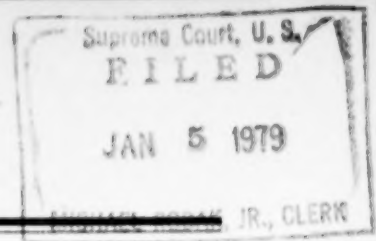


No. 78-771



In the Supreme Court of the United States
OCTOBER TERM, 1978

JOHN F. QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner seeks review of the dismissal of his refund suit for federal wagering taxes and the judgment in favor of the government's counterclaim for such taxes plus fraud penalties and interest.

The pertinent facts are as follows: Petitioner is a professional gambler who accepted wages on horse races and other sporting events from January 1, 1955 through August 31, 1961 (Pet. App. 2a; Ap-

pendix, *infra*, 1a).¹ During that period, petitioner filed monthly wagering tax returns (Forms 730) (Appendix, *infra*, 2a). When the Internal Revenue Service audited petitioner's income tax returns for 1955 and 1956, it requested him to furnish records substantiating his deductions from wagering income. In response to this request, petitioner furnished documents purporting to relate to gambling activities for the entire two-year period under examination (Pet. App. 2a). However, a comparison made by the Internal Revenue Service between the information contained in the documents supplied by petitioner and data of actual races run over an extended period of time revealed that the documents covered petitioner's receipts and disbursements for a different period of 80 racing days from February 15, 1957 to May 18, 1957 (Pet. App. 2a-3a; Appendix, *infra*, 2a-3a). As a result, petitioner was charged with and pleaded guilty to the offense of submitting false documents to the Internal Revenue Service (Pet. App. 2a).

The Commissioner of Internal Revenue thereafter used the documents furnished by petitioner to determine his wagering tax liability for 1955-1957. Starting with the average daily wagers on horse races of \$773.60 during the 80-day period covered by the documents, the Commissioner projected petitioner's daily average for the entire period 1955-1957. The Commissioner also estimated petitioner's wagers on baseball games at \$100 per day and football games at

¹ The district court's findings of fact and conclusions of law are set forth in the Appendix, *infra*.

\$500 per week. The Commissioner's projections and estimates yielded an assessment of additional wagering taxes, penalties and interest of \$133,292.65 for 1955-1957 (Appendix, *infra*, 2a; Pet. App. 3a).

For the period 1958 to August 31, 1961, the Commissioner computed petitioner's wagers on the basis of information obtained from bettors, employees and telephone records (Appendix, *infra*, 4a). These computations yielded an assessment for additional wagering taxes, penalties and interest of \$171,918.78 (Appendix, *infra*, 2a). Petitioner made partial payment of the assessments and filed claims for refund. Upon the Service's denial of his refund claims, petitioner instituted this action in the United States District Court for the District of Nevada. The government thereafter counterclaimed for the total unpaid assessments. The district court entered judgment for the government on both the complaint and counterclaim and the court of appeals affirmed (Pet. App. 1a-4a).

Petitioner argues (Pet. 6-8) that the Internal Revenue Service's projection of his wagering income was invalid because it was based upon his false documents. But as the courts below correctly recognized, petitioner's records were not false in the sense that they were inaccurate but were false only because petitioner submitted them as a summary of his wagering activities over a two-year period. It was clearly established at trial that what petitioner had presented were his actual records of wagers on horse races covering a period of 80 racing days at specified tracks for the period February 15, 1957 to May 18,

1957. From these records, the Internal Revenue Service projected his wagers for 1955-1957.² There is accordingly no basis to petitioner's claim that the Commissioner's assessments were based upon false documents.

Contrary to petitioner's further argument (Pet. 6-7), the decision below does not conflict with either *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973) (en banc), or *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), cert. denied, 396 U.S. 986 (1969). In *Lucia*, the court remanded the case to the district court in order to give the taxpayer the opportunity to prove that the government's projection was improper. But the court did not, as petitioner suggests, hold that such projections are arbitrary as a matter of law. See *United States v. Janis*, 428 U.S. 433, 436-437 (1976). Here, unlike *Lucia*, petitioner has never argued that the government's projections are inaccurate.

Pizzarello is similarly distinguishable. There, the court disapproved an extrapolation of three days of gambling activity over a five-year period. But unlike the instant case, the taxpayer in *Pizzarello* disputed that he was engaged in gambling during the period at issue. Indeed, in a case subsequent to *Pizzarello* where the court upheld a similar extrapolation, the Second Circuit distinguished *Pizzarello* in part on the

² The court of appeals apparently assumed that the projection was used through August 31, 1961 (Pet. App. 3a). However, the findings of the district court correctly point out that the projection was limited to the period 1955-1957. See Appendix, *infra*, 3a.

ground that there was a failure of proof that the taxpayer in that case had accepted wagers over the five-year period alleged. *Hamilton v. United States*, 309 F. Supp. 468, 473 (S.D. N.Y. 1969), aff'd *per curiam*, 429 F.2d 427 (2d Cir. 1970), cert. denied, 401 U.S. 913 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * * *

[Filed Jan. 12, 1976]

Civil LV 1826

JOHN F. QUINN, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The oral decision of the Court rendered at the conclusion of the trial is hereby made a part of the Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is a civil action for the refund of wagering excise taxes, penalties, and interest paid by the plaintiff for the period January 1, 1955 through August 31, 1961, except for the months of November and December, 1955 and July, 1956, in the amount of \$770 plus interest. The defendant has counter-claimed for the remaining unpaid balance of \$286,-371.82 plus interest which remains due on the assessment.

2. John F. Quinn (hereinafter referred to as the plaintiff), at the time this action was brought, was

a resident of Las Vegas, Nevada. During the taxable periods in issue, the plaintiff was a resident of Omaha, Nebraska, and during the period was there engaged in the business of accepting wagers.

3. The plaintiff filed Wagering Tax Returns (Forms 730) monthly for the periods shown above and paid the sums shown thereon.

4. On June 9, 1967, additional assessments were made as follows:

	1955-1957	1958-August, 1961
Tax assessment	\$ 61,998.49	\$ 88,211.94
50 percent fraud penalty	31,256.61	44,106.09
Interest	40,037.55	39,600.75
TOTAL	\$133,292.65	\$171,918.78

5. On March 31, 1972, the plaintiff filed separate claims for refund and abatement of the taxes for each of the 77 monthly taxable periods involved in this action. Each claim for refund was accompanied by a check for \$10 as partial payment of the outstanding deficiency for each period.

6. On April 25, 1972, the claims for refund were disallowed. This action was filed on May 17, 1972. The defendant counterclaimed for unpaid taxes, penalties and interest in the amount of \$286,371.82 for the periods January, 1955 through October, 1955, January, 1956 through June, 1956 and August, 1956 through August, 1961.

7. On September 8, 1958, the plaintiff voluntarily gave to an agent of the Internal Revenue Service,

wagering records purported to substantiate wagers received during the years 1955 and 1956.

8. These records, called "In" and "Out" sheets were submitted to establish the excise tax paid for the years 1955 and 1956 and showed the individual horse race wagers and amounts paid out to patrons on winnings.

9. Upon analysis of these "In" and "Out" sheets, which were represented by the plaintiff as showing the wagers received for the years 1955 and 1956, it was determined by the agents that they were actually records of wagers on horse races actually run on specified tracks for the period February 15, 1957 to May 18, 1957, a total of 80 days, rather than for the years 1955 and 1956. The total of the wagers made for this period divided by the 80 days of actual racing, results in an average wager of \$773.60 per day. This figure, computed from 80 racing days was then projected over the number of racing days the plaintiff was engaged in accepting wagers during 1955, 1956 and 1957 to arrive at a total tax of \$61,998.49 for this period.

10. The gross wagers for 80 days determined and projected by the agents for this period is reasonable. *Pinder v. United States*, 330 F. 2d 119 (C.A. 5, 1964); *Mersel v. United States*, 420 F. 2d 517 (C.A. 5, 1969); *Washington v. United States*, 402 F. 2d 3 (C.A. 4, 1968); *Hamilton v. United States*, 309 F. Supp. 468 (S.D.N.Y., 1969).

11. Wagers placed on baseball games were estimated and included at \$100 per day during the season.

12. Football wagers were estimated and included at \$500 for each weekend during the season.

13. On January 31, 1961, an indictment was returned by the Grand Jury charging the plaintiff with making "false, fictitious and fraudulent statements" on the basis of the "In" and "Out" sheets submitted by the plaintiff. The plaintiff entered a plea of "guilty" to this charge on April 6, 1961.

14. For the years 1958, 1959, 1960, up to and including August 31, 1961, a computation of the wagers received by the plaintiff was prepared by the Internal Revenue Service based upon information obtained from bettors, employees, and telephone records.

15. No records were supplied by the plaintiff at the time of the examination except the "In" and "Out" sheets.

16. On the basis of this testimony and records, an additional assessment of taxes, penalties and interest was made for the period 1958 to August 1961, in the amount of \$171,918.78.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the action and the parties under Title 28 U.S.C., Section 1346(a) (1).

2. Section 4401 of the Internal Revenue Code of 1954 (26 U.S.C.) provides that a person who is engaged in the business of accepting wagers is liable

for an excise tax based upon ten percent of the gross wagers.

3. The tax imposed by Section 4401 of the Internal Revenue Code of 1954 (26 U.S.C.) is constitutional and was not rendered unconstitutional by the decisions of the United States Supreme Court in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968). *Washington v. United States*, 402 F.2d 3 (C.A. 4, 1968), cert. denied, 402 U.S. 978 (1971).

4. The assessment of additional taxes for the periods involved was not barred by the statute of limitations under the provisions of the Internal Revenue Code of 1954 which deal with civil fraud. Sections 6501(c)(1) and 6501(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.). The requisite proof of civil fraud is provided by evidence that:

(a) The plaintiff failed to maintain adequate records of his wagering activities, *Spies v. United States*, 317 U.S. 492 (1943).

(b) The plaintiff consistently understated his gross wagers over a period of years, *Holland v. United States*, 348 U.S. 121 (1954).

(c) Plaintiff admittedly filed false and misleading statements with agents of the Internal Revenue Service, *United States v. Beacon Brass Co.*, 344 U.S. 43 (1952).

5. The assessment of an additional tax of 50 percent due to fraud pursuant to Section 6653(b) of the Code (26 U.S.C.) is of a remedial character and not

in the nature of a penal assessment, *Helvering v. Mitchell*, 303 U.S. 391 (1938).

6. The Commissioner's determination of the gross amount of wagers accepted by the plaintiff is presumed to be correct and plaintiff has the burden of proving error in the Commissioner's determination. Inasmuch as plaintiff has failed to produce records or other evidence from which a correct assessment could be made, he has not satisfied his burden of proof and the Commissioner's determination of the gross amount of wagers is deemed to be correct. *Lewis v. Reynolds*, 384 U.S. 281 (1932); *Helvering v. Taylor*, 293 U.S. 507, 514 (1935).

7. The requirement that it is the burden of the plaintiff to prove the incorrectness of the tax assessed in a gambling excise tax case does not violate the privilege against self-incrimination. *United States v. Donlon*, 355 F.Supp. 220 (Del., 1973), aff'd 487 F.2d 1395 (C.A. 3, 1973); *Higginbotham v. United States*, 491 F.2d 432 (1974).

8. This Court is without jurisdiction to abate assessed and unpaid taxes, penalties and interest. Section 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.), *Grain Belt Transportation Co. v. United States*, 70-1 U.S.T.C. par. 15, 940 (Kan., April 16, 1970), *Etheridge v. United States*, 300 F.2d 906 (C.A. D.C., 1962).

9. Any findings of fact deemed or properly constituting a conclusion of law hereby is adopted as a conclusion of law.

10. Plaintiff's complaint for refund of Internal Revenue Taxes in this action should be dismissed and defendant shall have judgment on its counterclaim in the amount of \$286,371.82 plus interest as provided by law, together with its costs.

DATED: January 12, 1976

/s/ George H. Boldt
United States District Judge

Receipt of the foregoing is acknowledged this — day of January, 1976, and is APPROVED AS TO FORM AND CONTENT:

GOODMAN & SNYDER

Submitted by:

/s/ Harold S. Larsen
HAROLD S. LARSEN
Attorney
Tax Division
Department of Justice

I hereby attest and certify on 1-22-76 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

JOHN A. PORTER
Clerk, U. S. District Court
District of Nevada

By /s/ Linda Shaw
Deputy